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The Fair Housing Act, the Communications Decency Act, and the Right of Roommate Seekers to Discriminate Online

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"Risking overstatement only slightly, the Internet represents a brave new world of free speech."[1]

INTRODUCTION

When the 90th Congress passed Title VIII of the Civil Rights Act of 1968, it could not predict all of the contexts in which the Fair Housing Act[2] ("FHA") would be applied. Just as the 90th Congress could not have envisioned the FHA's application to cyberspace, the 104th Congress seemingly failed to foresee that the Communications Decency Act[3] ("CDA") would immunize Internet service providers ("ISPs") from publishing prohibited advertisements that are patently illegal in any other context.[4] As advertisers shift from classified advertising in newspapers to advertisements online[5] and individuals

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1. Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) (quoting Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1141 (1996)).

2. Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2006).

3. Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560, 561 (2006).

4. Congress' failure to take the FHA into account is remarkable given that Congress amended the FHA during the same session the CDA was passed. *See* Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 1003 (2002).

5. For example, classified advertisement site Craigslist is used by twenty-five million people each month and receives twenty million self-published advertisements each month. Keith McArthur, *The Hippie Gets a Job; Craigslist's Free Online Classified Ads Aren't the Route to Quick Riches, But CEO Jim Buckmaster Likes It That Way*, GLOBE & MAIL (Toronto),

increasingly turn to the Internet to communicate,[6] a major concern is the implication of that shift to the enforcement of 42 U.S.C. § 3604(c),[7] the FHA provision prohibiting the use of discriminatory advertising in housing.[8]

Case law construing the CDA, which seems to explicitly exempt "interactive computer services"[9] ("ICSs") from liability for third-party content, has been favorable to ISPs and to Web sites. Recently, however, a few courts have shifted slightly the interpretation of the CDA, weakening broad immunity for ISPs. Dicta in several cases and reasoning from decisions in the Eighth and Ninth Circuits have foreshadowed a faint reigning in of 47 U.S.C. § 230 immunity.

However slight this shift may be and regardless of whether Congress specifically intended to void the application of § 3604(c) to online speech, it is important that Web sites remain immunized by the CDA in order for housing advertisements to continue to be widespread. The empowerment of individuals to place advertisements

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Aug. 9, 2007, at B7, *available at* http://www.theglobeandmail.com/servlet/story/RTGAM.20070808.gtcraig0808/BNStory/GlobeTQ/home.

6. According to the Pew Internet and American Life Project, 72% of American adults use the Internet on an average day, and 91% of American adults have used an Internet search engine to find information. http://www.pewinternet.org/trends.asp (follow "Online Activities—Daily" hyperlink; then follow "Online Activities—Total" hyperlink) (last visited Nov. 11, 2008). There were more than 209 million adult Americans in 2000. U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, CENSUS 2000 PROFILE 2 (2002), *available at* http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf.

7. This Note will refer to the FHA's discriminatory advertising prohibition as "§ 3604(c)."

8. *See, e.g.*, Chang, *supra* note 4; Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471 (2008); J. Andrew Crossett, Note, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195 (2008); Diane J. Klein & Charles Doskow, *Housingdiscrimination.com? The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329 (2008); Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805 (2007); James D. Shanahan, Note, *Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet*, 60 FED. COMM. L.J. 135 (2007); Jeffrey M. Sussman, Note, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194 (2007).

9. An ICS is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2006).

online and easily locate others with whom to live is an important step in furthering housing integration. Courts will not categorize ICSs as publishers of third-party content unless the ICSs have solicited and manipulated content.[10] Yet the exact extent to which courts will allow such activity without losing immunity is not yet clear.

This Note proposes that the tension between the FHA and the CDA be resolved in favor of ISPs and Web sites that do not take substantial steps in the creation of information until clear rules are delineated for them to follow. In the absence of bright-line rules from courts, Congress should step in and provide those rules. This Note further proposes that Congress should ensure that roommate seekers subject only to § 3604(c) of the FHA should not be prevented from placing discriminatory housing advertisements online. Because access to housing has greatly improved since the passage of Title VII, and because § 3604(c) places too great a burden on the rights to free speech and intimate association, Congress should not prohibit individuals qualifying for the "Mrs. Murphy" exemption[11] from placing advertisements online evincing a discriminatory preference.

This Note will analyze the courts' recent shift and its potential impact on CDA immunity. Part I[12] examines landmark cases involving the Fair Housing Act and § 3604(c)'s prohibition of discriminatory advertising. It will demonstrate that the broad construction of the Act by the Supreme Court and various courts of appeals is in keeping with the FHA's policy of promoting fair housing practices to the fullest extent allowable under the Constitution.[13] Part II[14] discusses important cases interpreting the CDA's § 230 grant of immunity to ISPs hosting third-party content. That Part will show the expansive interpretation courts have given this part of the CDA, including immunizing Web sites from civil rights claims under the FHA.[15] The court decisions that have

10. *See infra* discussion Part II.
11. *See infra* note 20 and accompanying text.
12. *See infra* notes 79–135 and accompanying text.
13. 42 U.S.C. § 3601 (2006).
14. *See infra* notes 88–135 and accompanying text.
15. Section 230 immunity has been applied in multiple contexts, including "defamation actions . . . negligence, unfair competition laws, contract claims, and even breaches of state

weakened slightly CDA immunity have not yet led to any successful FHA claims.[16]

Part III[17] analyzes the tension between these two competing statutes, arguing that Congress will have to intervene in order to harmonize them if § 3604(c) is going to have any application to online housing advertisements. However, Part III will consider the different contexts in which the FHA is now applied, not only online rather than in newspapers, but also in a society in which access to housing is no longer the widespread problem it once was. It will also take into account the unique position of online roommate advertising, as well as the free speech rights and freedom of association rights of individuals who qualify for the "Mrs. Murphy" exemption. Part III ultimately contends that individuals should be free from liability when they state discriminatory preferences in online roommate advertisements.[18]

I. THE FAIR HOUSING ACT

Section 3604(c) makes it illegal:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex,

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securities laws and cyberstalking." Olivera Medenica, *The Immutable Tort of Cyber-Defamation*, J. INTERNET L., Jan. 2008, at 3, 5 (2008).

16. *But see* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc) (holding a Web site responsible for some third-party content and remanding to the district court to determine if FHA violations occurred). *See* also *infra* notes 127–35 and accompanying text.

17. *See infra* notes 136–71 and accompanying text.

18. An individual who feels discriminated against because of an online advertisement currently has a cause of action under § 3604(c) against the person who posted the content on the Web site. Sussman, *supra* note 8, at 217. For a discussion of obtaining personal jurisdiction based on an individual's Internet use, see Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341, 358–66 (2000); Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1166–84 (2005).

> handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[19]

There are a few exceptions to the FHA's substantive coverage in § 3604, including "any single-family house sold or rented by an owner" who meets certain requirements and "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."[20] However, § 3604(c) applies to "*any* notice, statement, or advertisement, with respect to the sale or rental of a dwelling"[21] and does not require proof of an intention to discriminate.[22] The FHA's extensive legislative history "produced little material concerning the provision that became 3604(c)."[23]

In 1972, the Fourth Circuit heard *United States v. Hunter*,[24] the first major case challenging § 3604(c).[25] The Attorney General

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19. 42 U.S.C. § 3604(c) (2006). The FHA's original protections were race, color, religion, sex, and national origin. Congress added disability ("handicap") and familial status (living with or having custody of a minor) in the Fair Housing Amendments Act of 1988, Pub.L. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (2006)). These amendments also strengthened the Department of Housing and Urban Development's ("HUD") enforcement mechanisms. *Id.* §§ 3610–3614.

20. *Id.* § 3603(b)(1), (2). 42 U.S.C. § 3603(b)(2) is commonly known as the "Mrs. Murphy" exemption. Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 191 n.10 (2001). For a critique of the Mrs. Murphy exemption, see James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R-C.L. L. REV. 605 (1999). The two other FHA exemptions allow religious organizations and private clubs to "giv[e] preference" to members as long as housing is provided "for other than a commercial purpose." 42 U.S.C. § 3607(a) (2006).

21. 42 U.S.C. § 3604(c) (emphasis added).

22. JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2:6, at 2–15 (2006).

23. Schwemm, *supra* note 20, at 198 (describing the floor debates, only a few of which discussed the advertising provision, as the main source of congressional comment on the FHA's individual provisions). For a detailed account of the FHA's passage, see Jean Eberhart Dubosfsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 207–12 (1978); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 222–39 (2006).

24. United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972).

25. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 38 n.39 (1983).

sought an injunction[26] against the defendant's newspaper after it published two classified advertisements for an apartment in a "white home."[27] The defendant argued that § 3604(c) was not intended to apply to newspapers, that it was unconstitutional as applied to the defendant, and that the phrase "white home" did not violate the Act.[28] Focusing on the plain language of § 3604(c), the court reasoned that "[i]n the context of classified real estate advertising, landlords and brokers 'cause' advertisements to be printed or published and generally newspapers 'print' and 'publish' them," bringing landlords and newspapers within § 3604(c)'s domain.[29] Citing the FHA's legislative history as "evidence that the publication of discriminatory classified advertisements in newspapers was precisely one of the evils the Act was designed to correct," the court concluded that § 3604(c) applied to all publishing media, including newspapers.[30]

The court also dismissed Hunter's claim that the FHA violated the newspaper's First Amendment[31] right to freedom of the press, relying on "an unbroken line of authority from the Supreme Court down" emphasizing the government's ability to regulate commercial advertising.[32] In response to the defendant's argument that the phrase "white home" is not discriminatory, the court relied on three propositions. First, the court believed that the "natural interpretation

26. 42 U.S.C. § 3614 allows the Attorney General to bring suit in district court when she has a "reasonable belief" that there is a "pattern or practice of resistance to the full enjoyment of any of the rights granted by" the FHA, or if a particular denial of rights "raises an issue of general public importance." 42 U.S.C. § 3614(a) (2006).

27. *Hunter*, 459 F.2d at 209.

28. *Id.*

29. *Id.* at 210.

30. *Id.* at 211 (citing *Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Hous. and Urban Affairs, S. Comm. on Banking and Currency*, 90th Cong. 386, 388 (1967) (testimony of George Meany)).

31. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

32. *Hunter*, 459 F.2d at 211 (citing cases that have since lost some of their effect due to Supreme Court jurisprudence expanding protection of commercial speech). *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748, 762 (1976) ("[S]peech which does 'no more than propose a commercial transaction' [does not] lack[] all [First Amendment] protection."). However, *Hunter's* holding that § 3604(c) does not violate the First Amendment has not been overturned "because all constitutional challenges to Title VIII have thus far been rejected." ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 6:3 (1990).

of the advertisements" by an "ordinary reader" would "indicate a racial preference in the acceptance of tenants."[33] Second, the individual who placed the advertisements admitted that his use of the phrase "white home" was intended to signal his racial preference.[34] Finally, the court also relied on the Department of Housing and Urban Development ("HUD") regulations that applied the FHA to newspapers and presumed that phrases like "white home" are discriminatory.[35]

Later in the same year that *Hunter* was decided, the Supreme Court heard *Trafficante v. Metropolitan Life Insurance Co.*,[36] its first Title VIII case.[37] Two tenants sued the owner of their apartment complex for discriminating against non-whites.[38] By actively opposing integration, the plaintiffs alleged that the owner had deprived them of "the social benefits of living in an integrated community."[39] This deprivation caused the plaintiffs to suffer emotional and economic damages because they were "'stigmatized' as residents of a 'white ghetto.'"[40] The district court dismissed the case, finding that the plaintiffs did not have standing to sue as an "aggrieved person" under the FHA.[41] The Ninth Circuit affirmed the dismissal.[42]

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33. *Hunter*, 459 F.2d at 215. For a critique of the "ordinary reader" standard, see Andrene N. Plummer, Comment, *A Few New Solutions to a Very Old Problem: How the Fair Housing Act Can Be Improved to Deter Discriminatory Conduct By Real Estate Brokers*, 47 HOW. L.J. 163, 179–80 (2003) ("While it has helped to resolve some housing discrimination cases, the ordinary reader standard falls short of its intended mark. . . . [T]he ordinary reader test needs to be amended to accommodate the relevant audience.").

34. *Hunter*, 459 F.2d at 215. "The defendant" later explained his reason for including the phrase in his ad: 'It's really a kindness to colored people. There's no use making them * * * come here when I'm not going to rent to them.'" *Id.* (alteration in original).

35. *Id.* at 215 n.11 (citing Advertising Guidelines for Fair Housing, 37 Fed. Reg. 6700 (Apr. 1, 1972)).

36. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972).

37. SCHWEMM, *supra* note 25, at 39.

38. *Trafficante*, 409 U.S. at 206–07.

39. *Id.* at 205.

40. *Id.* at 208.

41. *Id*. 42 U.S.C. § 3602 (2006) defines an "aggrieved person" as "any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i)(1)-(2) (2006). Section 3620 gives an aggrieved person the right to file a HUD complaint within one year of a discriminatory incident. *Id*. § 3610(a)(1)(A)(i). Section 3613 allows an aggrieved person to file a civil action in federal or state court within two years of a

In a unanimous decision, the Supreme Court reversed the Ninth Circuit on the issue of standing and remanded the case.[43] Given "that complaints by private persons are the primary method of obtaining compliance with the Act," the Court construed standing under the statute to reach as broadly as the Constitution allowed.[44]

The last significant case to analyze § 3604(c)'s application to newspapers was *Ragin v. New York Times Co*.[45] Individual African American housing seekers[46] sued the *New York Times*'s publisher for violating § 3604(c) by running housing advertisements indicating racial preferences based on the human models used.[47] The court began by analyzing the terms "indicates,"[48] which resulted in the court's adoption of *Hunter*'s ordinary reader standard, and "preference,"[49] which suggested that Congress meant to capture any discriminatory housing advertisement, even if it were subtle.[50] Like the Fourth Circuit in *Hunter*, the Second Circuit relied on HUD regulations to show that the practice at issue was discriminatory.[51] In

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discriminatory incident. *Id.* 3613(a)(1)(A). For a critique of the enforcement options available to individuals under the FHA, see Terry W. Gentle, Jr., Note, *Rethinking Conciliation Under the Fair Housing Act*, 67 TENN. L. REV. 425, 427 (2000) (arguing that conciliation procedures limit the effectiveness of the FHA and "should be abandoned in favor of more formal systems of dispute resolution").

42. *Trafficante*, 409 U.S. at 208.

43. *Id.* at 212.

44. *Id.* at 209. (citing Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971)). The D.C. Circuit has espoused the same view. *See* Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C. Cir. 1990) (Ginsburg, J.) ("No 'prudential standing' inquiry is in order, however, because Congress intended standing under the Fair Housing Act to extend to the full limits of Article III.") (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982)).

45. Ragin v. N.Y. Times Co., 923 F.2d 995 (2d Cir. 1991), *cert. denied*, 502 U.S. 821 (1991).

46. Open Housing Center, Inc., a non-profit fair housing group, also sued the newspaper. *Id.* at 998. For a summary of standing principles applied to fair housing organizations, see Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 AKRON L. REV. 613, 624–34 (2001).

47. *Ragin*, 923 F.2d at 998. The advertisements featured either exclusively all white models, or African-American models only in predominantly African-American neighborhoods, over a twenty year period. *Id.*

48. *Id.* at 999.

49. *Id.*

50. *Id.* at 999–1000. "Ordinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross, and we read the word 'preference' to describe any ad that would discourage an ordinary reader of a particular race from answering it." *Id.*

51. *Id.* at 1000 n.1 (citing 24 C.F.R. § 109.30(b) (1990)).

response to the newspaper's First Amendment challenge, the court held "that real estate advertisements that indicate a racial preference 'further an illegal commercial activity: racial discrimination in the sale or rental of real estate.'"[52]

The *Times* also argued that charging it with the responsibility of ensuring that the advertisements it published conformed to the FHA was an unconstitutional burden, "compromis[ing] the unique position of the free press."[53] The court reasoned that the *Times*'s FHA responsibilities were distinct from its protected speech involving news stories and editorials.[54] The *Times* argued that making it "an enforcer of otherwise desirable laws" was an unconstitutional burden.[55] The court dismissed the newspaper's concerns, emphasizing that only racial messages were at issue and "the 'would-be regulators,' namely the plaintiffs, are entirely willing to bear the burden of proving at trial that the advertisements published by the *Times* indicated a racial preference."[56] The court was not convinced by the *Times*'s contention that it was incapable of monitoring housing advertisements because the *Times* routinely screened advertisements for a number of reasons, and, as a policy matter, it "would undermine other civil rights laws."[57]

Finally, the *Times* voiced its concern that allowing the claims would "lead to a large number of staggering, perhaps crushing, damage awards that might over time impair the press's role in society."[58] This did not strike the court "as a reason to immunize publishers from any liability . . . . Rather, it is reason to assert judicial control over the size of damage awards for emotional injury in

52. *Id.* at 1002 (citing Ragin v. N.Y. Times Co., 726 F. Supp. 953, 962 (S.D.N.Y. 1989)).
53. *Ragin*, 923 F.2d at 1003.
54. *Id.*
55. *Id.*
56. *Id.* at 1004.
57. *Id.* The court noted that "[g]iven that this extensive monitoring . . . [is] routinely performed it strains credulity beyond the breaking point to assert that monitoring ads for racial messages imposes an unconstitutional burden." *Id.*
58. *Id.* at 1005. The Fair Housing Amendments Act of 1988 also made the "option [of going directly to court] easier to use and more attractive by extending the statute of limitations . . . to two years, and by eliminating the $1,000 cap on punitive damages and the 'financial inability' limitation on the award of attorney's fees." Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 749 (1993).

individual cases."[59] The court affirmed the district court's refusal to dismiss the case.[60]

The Supreme Court's interpretation of the Civil Rights Act of 1866 in *Jones v. Alfred H. Mayer Co.*[61] is also central to understanding the interpretation of the FHA in conjunction with other statutes. In 1965, Jones and his wife sued a private housing developer for refusing to sell them a home because they were African American.[62] The couple's claim, which relied on the Civil Rights Act of 1886,[63] was dismissed by the district court and the Eighth Circuit because the Act was held only to apply to state action.[64] The Supreme Court reversed, holding that "§ 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property."[65] The Court concluded that "[the] enactment [of the Civil Rights Act of 1968] had no effect upon § 1982."[66]

Since the passage of the FHA, HUD has issued a number of regulations regarding § 3604(c). Rules codified in the Code of Federal Regulations ("C.F.R.") have often been cited by courts interpreting § 3604(c)[67] and are entitled to deference under *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc*.[68] Section

59. *Ragin*, 923 F.2d at 1005.

60. *Id.*

61. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

62. *Id.* at 412.

63. 42 U.S.C. § 1982 (2006). The statute states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.*

64. *Jones*, 392 U.S. at 412.

65. *Id.* at 413. The Civil Rights Act of 1968 was passed after the Court heard oral argument; the parties submitted briefs discussing whether the Act's passage had any effect on the litigation. *Id.* at 417–18 n.21.

66. *Id.* at 416. The Court relied on § 815 of the 1968 Act, currently codified at 42 U.S.C. § 3615 (2006), which states that "[n]othing in this subchapter shall be constructed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter." *Id.*

67. *See, e.g.*, Ragin v. N.Y. Times Co., 923 F.2d 995, 1000 n.1 (2d Cir. 1991); United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972).

68. Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (requiring courts to defer to administrative agencies when a "statute is silent or ambiguous with respect to the specific issue [if] the agency's answer is based on a permissible construction of the statute"). For an exhaustive list of FHA cases citing HUD interpretations, see SCHWEMM, *supra* note 32, at § 7:5 n.17.

109 of the C.F.R. contained detailed guidance about the "[u]se of words, phrases, symbols and visual aids" in housing advertising.[69] In 1996, this section was removed in response to President Clinton's directive to administrative agencies to eliminate outdated regulations.[70] However, this section, along with other internal HUD communications, is still relied on as representing HUD's interpretation of the law.[71] One internal communication has shown HUD's approval of the application of § 3604(c) to the Internet,[72] but it is not entitled to deference from courts.[73]

Education and outreach are two other mechanisms by which HUD seeks to end housing discrimination. The agency recently conducted two studies to determine the public's knowledge of and support for fair housing laws.[74] Public awareness of fair housing laws is

69. 24 C.F.R. pt. 109, *available at* http://www.ncfhc.fairhousing.com/index.cfm?method=page.display&pageid=605.

70. Memorandum to Heads of Departments and Agencies on Regulatory Reform, 1 PUB. PAPERS 304 (Mar. 4, 1995); *see also* Office of the Assistant Secretary for Fair Housing and Equal Opportunity, Regulatory Reinvention, Streamlining of HUD's Regulations Implementing the Fair Housing Act, 61 Fed. Reg. 14378 (Apr. 1, 1996) ("While this information is very helpful to HUD's clients, HUD will more appropriately provide this information through handbook guidance or other materials, rather than maintain it in title 24.").

71. *See, e.g.*, Memorandum from Roberta Achtenberg, Assistant Sec'y for Fair Hous. and Equal Opportunity, to Senior HUD Fair Hous. Enforcement Staff (Jan. 9, 1995), *available at* http://www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf (providing FHEO "Guidance Regarding Advertisements Under § 804(c) of the Fair Housing Act," including reference to searching for roommates).

72. *See* Memorandum from Bryan Greene, Deputy Assistant Sec'y for Enforcement and Programs, to FHEO Reg'l Dirs. (Sept. 20, 2006), *available at* www.fairhousing.com/include/media/pdf/Websites.pdf. Secretary Greene analogizes discriminatory advertising on Web sites to newspaper violations of the FHA and concludes that the CDA does not immunize Web sites from FHA liability. He recommends that "proposed conciliation agreements include provisions designed to prevent discriminatory advertisements from being posted to the Web site; this may include the Web site agreeing to practices such as screening, filtering, pop-up warnings, or user self-certification." *Id.*

73. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, do not warrant *Chevron*-style deference. . . . [They] are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'") (citations omitted). *But see Christensen*, 529 U.S. at 591 (Scalia, J., concurring) ("[The agency's view] warrants *Chevron* deference if it represents the authoritative view of the [agency].").

74. *See* OFFICE OF POLICY DEV. & RESEARCH, U.S. DEPT. OF HOUS. & URBAN DEV., DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT, AND USE OF FAIR HOUSING LAW (2006), *available at* www.huduser.org/Publications/pdf/FairHousingSurveyReport.pdf [hereinafter "HUD 2006 STUDY"]; OFFICE OF POLICY DEV. & RESEARCH, U.S.

particularly important for enforcement because "complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'"[75] A 2002 report revealed that one-half of adult Americans can identify discriminatory housing behavior, but knowledge about specific protected classes varied greatly.[76] For purposes of enforcement of the FHA by individuals, perhaps the most important finding was that 14 percent of the respondents (the equivalent of 28 million people) had experienced housing discrimination, but only 17 percent of those had taken any action in response.[77] HUD's 2006 follow-up report found that knowledge of fair housing laws remained the same, but that support for them had slightly increased.[78]

II. THE COMMUNICATIONS DECENCY ACT

Congress passed the Communications Decency Act as Title V of the Telecommunications Act of 1996.[79] Section 230 of the CDA provides "[p]rotection for private blocking and screening of offensive material."[80] Specifically, the CDA requires that ISPs not be treated as publishers or speakers of "information provided by another

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DEPT. OF HOUS. & URBAN DEV., HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS (2002), *available at* www.huduser.org/Publications/pdf/hmwk.pdf [hereinafter "HUD 2002 STUDY"]. Both studies involved telephone surveys in which participants were given ten scenarios and asked to identify the eight scenarios that violated the FHA. HUD 2006 STUDY, *supra*, at i–ii.

75. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting the Solicitor General).

76. HUD 2002 STUDY, *supra* note 74, at vi–vii. For instance, only 38 percent knew "that it is generally illegal to treat families with children any differently from households without children." *Id*. at vii.

77. *Id.* at ix. The report acknowledged that it did not objectively measure housing discrimination because it allowed respondents to define discrimination, but they were asked about perceived discrimination after the survey was completed. *Id.* For an assessment of housing discrimination complaints in 2006, see Deborah Barfield Berry & Robert Benincasa, *A Growing Number Allege Unfair Treatment in Housing Market*, USA TODAY, Sept. 27, 2007, *available at* http://www.usatoday.com/news/nation/2007-09-28-housing-main_N.htm.

78. HUD 2006 STUDY, *supra* note 74, at ii.

79. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15, 18, and 47 U.S.C.). The Telecommunications Act was Congress's first comprehensive adjustment to communications law since the passage of the Communications Act of 1934, which the 1996 Act amended. Sen. Ted Stevens, Policy Essay, *The Internet and the Telecommunications Act of 1996*, 35 HARV. J. ON LEGIS. 5, 5–6 (1998).

80. 47 U.S.C. § 230 (2006). This Note will refer to this section of the CDA as "§ 230."

information content provider [("ICP")]."[81] The legislative history of § 230 reveals that Congress was responding to *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[82] a New York appellate court case that held Prodigy, an ISP, liable as a publisher of third-party information.[83] The Conference Committee believed that treating an ISP as a publisher when it censors content would make it difficult for parents to protect their children from objectionable content because ISPs would choose not to screen content rather than risk being held liable.[84] Accordingly, the CDA eliminates civil liability for ISPs that "restrict access to or availability of material"[85] and requires that ISPs not be treated as publishers of third-party content.[86] Finally, the CDA enumerates laws on which it has no effect, but it does not mention federal civil rights laws.[87]

The first case to indicate the breadth of protection that § 230 would afford ISPs was *Zeran v. America Online, Inc.*[88] The plaintiff tried to hold America Online ("AOL") liable for not quickly

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81. 47 U.S.C. § 230(c)(1) (2006). "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

82. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (concluding that Prodigy was a publisher of content on an electronic bulletin board because it exercised "editorial control" by utilizing an "automatic software screening program" and manual review by employees to enforce its publicized content guidelines).

83. H.R. REP. NO. 104-458 (1996), at 194 (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.").

84. *Id.* For an overview of § 230's legislative history, see Chang, *supra* note 4, at 988–94 ("[T]he CDA as enacted ultimately embodies a political compromise between the Senate and the House that provides for greater governmental regulation of the Internet and encourages an active role for [ISPs] in screening offensive online material."). *See also* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 64–72 (1996); Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 174–78 (2006).

85. 47 U.S.C. § 230(c)(2) (2006).

86. *Id.* § 230(c)(1).

87. *See id.* § 230(e)(1)–(4) (not affecting criminal law, intellectual property law, inconsistent state law, or Communications Privacy law).

88. Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997). For a timeline of § 230(c)(1) cases, see Myers, *supra* note 84, at 205–08.

removing false messages posted by a third party.[89] An anonymous third party posted a fictitious message on an AOL bulletin board six days after the 1995 Oklahoma City bombing claiming that Zeran was selling shirts celebrating the event.[90]

In holding that § 230 afforded complete immunity to AOL, the Fourth Circuit explained two chief purposes of the CDA. The first is to preserve "the robust nature of Internet communication" by minimizing any governmental interference;[91] the second is to incentivize ISPs to prevent offensive material from being posted.[92] The court cautioned that holding AOL liable after notification would not be a workable solution because "[e]ach notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information."[93] *Zeran*'s holding that "§ 230 creates a federal immunity to *any cause of action* that would make service providers liable for information originating with a third-party user of the service"[94] was the basis for several other jurisdictions' interpretation of the CDA.[95]

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89. *Zeran*, 129 F.3d at 328. Zeran also argued that AOL should have posted a retraction and screened for similar postings after he notified them of the false statements. *Id.*

90. *Id.* at 329. Zeran was overwhelmed by angry phone calls, including death threats, from Oklahoma City residents. He also sued an Oklahoma City radio station because an announcer read the posting on the air and encouraged listeners to call Zeran. *Id.*

91. *Id.* at 330.

92. *Id.* at 331.

93. *Id.* at 333. Thus, in upholding the district court's summary judgment for AOL, the Fourth Circuit emphasized the chilling effect on free speech that Zeran's position would entail. Some Web sites rely on community moderation to remove inappropriate material rather than Web site staff. Craigslist, for example, allows users to "flag" housing ads that state discriminatory preferences. Craigslist Flags and Community Moderation, http://www.craigslist.org/about/help/flags_and_community_moderation (last visited Feb. 21, 2008). "If a post receives enough negative flags it will automatically be removed (only one flag per person per post is counted)." *Id.*

94. *Zeran*, 129 F.3d at 330 (emphasis added).

95. *See, e.g.*, Universal Commc'n Sys., Inc., v. Lycos, Inc., 478 F.3d 413, 418–19 (1st Cir. 2007); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123–24 (9th Cir. 2003); Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003); Green v. Am. Online (AOL), 318 F.3d 465, 471 (3d Cir. 2003); Ben Ezra, Weinstein, and Co. v. Am. Online, Inc., 206 F.3d 980, 984–85 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998).

Two other cases involving AOL also demonstrate the robust immunity § 230 has afforded ISPs. In *Blumenthal v. Drudge*,[96] two employees of the White House sued Matt Drudge and AOL for defamation resulting from allegations of spousal abuse on the Drudge Report.[97] AOL paid Drudge to create content, marketed the Web site to its customers, and reserved the right to edit his content.[98] Despite this editorial control, the court found that "AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried" and was therefore granted immunity by § 230.[99]

In *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*,[100] the plaintiff, a publicly owned computer software firm, sued AOL for defamation resulting from inaccurate information about its share price and volume on an AOL Web site.[101] AOL deleted this third-party information when it discovered the errors; the plaintiff argued that AOL acted as an ICP by doing so.[102] As in *Blumenthal*, AOL's ability to delete content was not enough for it to lose § 230 immunity.[103]

The Ninth Circuit further defined the limits of § 230 immunity in *Carafano v. Metrosplash.com, Inc.*[104] The plaintiff, a professional actress, sought to hold the defendant, the operator of the dating Web site Matchmaker.com, liable for defamation when an anonymous third party created a fictitious profile for her.[105] Matchmaker.com required its users to complete intricate questionnaires soliciting a variety of information.[106] The Ninth Circuit held that Matchmaker.com's solicitation of information and aggregation of it

96. *Blumenthal*, 992 F. Supp. at 44.

97. *Id.* at 46. The Drudge Report is a news aggregation and gossip Web site. http://www.drudgereport.com (last visited Nov. 11, 2008).

98. *Blumenthal*, 992 F. Supp. at 47.

99. *Id.* at 50. The court conceded that AOL would not have § 230 immunity if it had jointly developed the content, but there was no evidence that AOL had done so.

100. Ben Ezra, Weinstein, and Co. v. Am. Online, Inc., 206 F.3d 980 (10th Cir. 2000).

101. *Id.* at 983.

102. *Id.* at 985–86.

103. *Id.* at 986.

104. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).

105. *Carafano*, 339 F.3d at 1122. Masterson also sued for invasion of privacy, misappropriation of the right of publicity, and negligence. *Id.*

106. *Id.* at 1121.

into a profile that could be matched with others did not justify holding it liable as an ICP.[107] The court held that "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process."[108]

A few recent cases have indicated that § 230 immunity may have slightly narrowed since *Zeran* was decided.[109] In *Doe v. GTE Corp.*,[110] college athletes who were unknowingly videotaped in locker rooms sued GTE, an ISP, under the Electronic Communications Privacy Act[111] for allowing the footage to be sold on various Web sites.[112] In dicta,[113] the Seventh Circuit indicated that reading § 230(c)(2) as a grant of immunity only when the ISP does not create the objectionable material would be more sensible because the goal of this section of the CDA is to encourage ISP blocking of offensive third-party material.[114] Furthermore, the court reasoned that reading § 230(c)(1) as a definition rather than a conferral of immunity[115] means that state laws requiring ISPs to protect third

107. *Id.* at 1124–25. The court reasoned that "no profile has any content until a user actively creates it." *Id.* at 1124.

108. *Id.* at 1124.

109. *See, e.g.*, Almeida v. Amazon.com, Inc., 456 F.3d 1316 (11th Cir. 2006) (approving of the Seventh Circuit's reasoning in *Doe*); Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 199 F. App'x 738 (11th Cir. 2006) (requiring defendants to prove that they are not an ICS and implying that merely inserting words into third party content is enough to make a Web site an ICS).

110. Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003).

111. The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.), is not preempted by the CDA. 47 U.S.C. § 230(e)(4) (2006).

112. *Doe*, 347 F.3d at 656.

113. The court affirmed the district court's dismissal because there were no applicable state laws requiring ISPs to remove harmful material. *Id.* at 662. Thus, the court's pontification on § 230 was unnecessary for it to decide the case.

114. *Id.* at 660. The court also recognized the possibility, which was adopted by the *Craigslist* court, that "§ 230(c)(1) forecloses liability that depends on deeming the ISP a 'publisher'—defamation law would be a good example of such liability." *Id.*

115. This subsection, which has the caption "Treatment of publisher or speaker," states that ICSs "shall [not] be treated as the publisher or speaker" of third party content; it does not mention liability. 47 U.S.C. § 230(c)(1) (2006). In contrast, § 230(c)(2), the caption of which is "Civil liability," specifically enumerates reasons that may not be used to hold an ISP liable. *Id.* § 230(c)(2). *But see* Myers, *supra* note 84, at 178 ("Judge Easterbrook's discomfort should not so much be with the incongruity between the caption and the text, but with Congress's

parties would not be affected by the CDA's preemption of state law.[116] The court worried that reading § 230(c)(1) as an immunity clause would encourage ISPs to take no action, a result at variance with the section's caption, "Protection for 'good samaritan' blocking and screening of offensive material."[117]

The Seventh Circuit's reasoning in *Doe* was relied upon by the plaintiffs in *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*[118] A nonprofit organization composed of law firms, the Chicago Lawyers' Committee for Civil Rights Under the Law ("CLC"), sued Craigslist for violating § 3604(c) through its hosting of allegedly discriminatory housing advertisements.[119] After examining § 230 case law, the district court concluded that *Zeran* only "bars those causes of action that would require treating an ICS as a publisher of third-party content" rather than "'any cause of action.'"[120] Criticizing *Zeran*'s language as "overbroad," the court emphasized a fatal flaw in the Fourth Circuit's reasoning: by acting as a traditional publisher and altering content, an ISP loses any immunity afforded by § 230(c)(1) because the ISP would be posting information it helped create.[121] The court granted summary judgment to Craigslist, "hold[ing] that, at a minimum, Section 230(c)(1) bars

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assumption that [ISPs] actually would help 'control' the Internet once Congress granted such immunity.").

116. *Doe*, 347 F.3d at 660 (explaining that 47 U.S.C. § 230(e)(3) preempts state and local laws that are inconsistent with § 230).

117. *Id.* (quoting 47 U.S.C. § 230(c)).

118. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006). *See also* Chang, *supra* note 4, at 986 ("[I]f § 230(c)(1)'s ban on the treatment of [ISPs] as publishers or speakers is read to immunize [ISPs] for all liability arising out of failure to screen online content, [ISPs] would have no legal incentive to take action to screen objectionable material or develop blocking technologies."). *But see* Leslie Paul Machado, *Immunity Under § 230 of the Communications Decency Act of 1996: A Short Primer*, J. INTERNET L. 10 No. 3, 9 (2006) ("[Chang's] argument ignores, however, that it is impractical, and may be impossible, to screen the number of postings that are placed on a Web site like craigslist every day.").

119. *Craigslist*, 461 F. Supp. 2d at 682. Advertisements in the record included phrases such as "NO MINORITIES," "Non-women of Color NEED NOT APPLY," "young cool landlord who wants one nice quiet person to rent her basement," "Apt. too small for families with small children," and "African Americans and Arabians tend to clash with me so that won't work out." *Id.* at 685–86.

120. *Id.* at 693.

121. *Id.* at 694–95.

claims, like the CLC's claim, that requires [sic] publishing as a critical element."[122]

The Seventh Circuit upheld the district court's decision, underscoring the "limited role of § 230(c)(1)" and recognizing that Craigslist was attempting "to expand § 230(c)(1) beyond its language."[123] Chief Judge Easterbrook relied on the Seventh Circuit's opinion in *Doe* to explain that § 230(c) is not "a general prohibition of civil liability for web-site operators and other online content hosts . . . . [P]erhaps § 230(c)(1) forecloses any liability that depends on deeming the ISP a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate ISPs in their capacity as intermediaries."[124] Also, Chief Judge Easterbrook emphasized that Congress's seeming inattention to the Fair Housing Act when it passed the CDA is irrelevant because "[t]he question is not whether Congress gave any thought to the Fair Housing Act, but whether it excluded § 3604(c) from the reach of § 230(c)(1)."[125] Given this view of § 230, "only in a capacity as publisher could craigslist be liable under § 3604(c)."[126]

The most recent case to tackle the CDA's application to § 3604(c) is *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.[127] Two fair housing groups sued the roommate-matching Web site for violations of § 3604(c).[128] The Web site solicited preferences via drop down menus, allowed users to create their own profiles with additional comments, organized the information to allow users to

122. *Id.* at 696–98 (footnote omitted).

123. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 670 (7th Cir. 2008).

124. *Id.* at 669–70 (citation omitted).

125. *Id.* at 671 ("Congress need not think about a subject for a law to affect it; effect of general rules continues unless limited by superseding enactments.") (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126–27 (1974)).

126. *Craigslist*, 519 F.3d at 671.

127. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007), *aff'd in part, rev'd in part, vacated in part en banc*, 521 F.3d 1157 (9th Cir. 2008).

128. *Roommates.com*, 489 F.3d at 924. Roommates.com was also sued for violations of various state fair housing laws. *Id. See* 42 U.S.C. § 3615 (2006) (allowing state and local laws that guarantee fair housing rights). For a list of state fair housing laws, see Craigslist State Fair Housing Laws, http://www.craigslist.org/about/state_fair_housing_laws.html (last visited Nov. 11, 2008).

search listings, and edited the user-supplied information in minor ways.[129] The Ninth Circuit held that Roommates.com, "[b]y categorizing, channeling and limiting the distribution of users' profiles . . . provides an additional layer of information that it is 'responsible' at least 'in part' for creating or developing."[130] Therefore, CDA immunity was not available and the case was remanded for the district court to determine if the alleged actions violated the FHA.[131]

An en banc panel of the Ninth Circuit upheld the portion of the original appellate decision ruling that Roommates.com lost CDA immunity because of the extent of its involvement in developing content.[132] Chief Judge Kozinski wrote for the majority that "Roommate's website is designed to force subscribers to divulge protected characteristics and discriminatory preferences, and to match those who have rooms with those who are looking for rooms based on criteria that appear to be prohibited by the FHA," thus distinguishing it from the Web site at issue in *Carafano*.[133] Like the previous *Roommates.com* decision, the majority emphasized the Web site's active solicitation of discriminatory material: "Roommate does not merely provide a framework that could be utilized for proper or improper purposes; rather, Roommate's work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site."[134] The case was again remanded for the district court to

129. *Roomates.com*, 489 F.3d at 924–26. Minor editing included changing a user-selected option of "'I will not live with children . . . [to] 'no children please.'" *Id.* at 926 n.6.

130. *Id.* at 929 (quoting 47 U.S.C. § 230(c), (f)(3) (2006)).

131. *Id.* at 929–30. The court found that Roommates.com was not liable for the extended essays in the "additional comments" section of user profiles because they were not sufficiently involved in the creation or development of that information. *Id.* at 929.

132. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 n.37 (9th Cir. 2008).

133. *Id.* at 1172 ("The salient fact in *Carafano* was that the website's classifications of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners depending on their voluntary inputs.").

134. *Id.* at 1172. Roommate.com's open comments section, which allows users to write whatever they want without having to choose from preformed answers, still received CDA immunity. *Id.* at 1173–74.

determine whether Roommates.com violated the FHA or California fair housing laws.[135]

III. ANALYSIS

As the case law of the CDA has demonstrated and other commentators have noted,[136] immunity for Web sites publishing discriminatory housing advertisements seems virtually assured at present. Litigation over the application of the FHA in cyberspace is likely to continue, and the tension between the FHA and the CDA will probably not be resolved until Congress intervenes.[137] This Note proposes that courts issue bright-line rules for interactive computer services to follow so that they will not unwittingly become ICPs and therefore lose CDA immunity. In the absence of bright-line rules from courts, Congress should step in and provide them. Just as the CDA's legislative history shows that Congress intended to overrule the reasoning of one particular case,[138] Congress could scan the case law and choose the rules it considers best. In either event, this Note further proposes that Congress should ensure that roommate seekers who qualify for the FHA's "Mrs. Murphy" exemption should be allowed to place discriminatory housing advertisements online for the reasons that follow. This could be accomplished by amending either the FHA or the CDA.

While fair housing is an important issue, the "generous construction" for the FHA that the Supreme Court announced in

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135. *Id.* at 1175.

136. *See, e.g.*, Sussman, *supra* note 8, at 217 ("The state of fair housing on the Internet is clear, but bleak. . . . [A]s the Internet evolves into a safe haven for housing discrimination . . . . consumers will likely face an increasing prevalence of discriminatory housing advertisements in the future.").

137. *See, e.g.*, Mike Hughlett, *Craigslist Suit Faces Speech Hurdle; Communications Law May Trump Fair Housing*, CHICAGO TRIBUNE, Mar. 26, 2006, at C1 ("[T]here is a 'real good chance Congress will revisit it. . . . You can't take a fair housing law that governs all advertising and say, 'We have this new technology that a younger generation uses—it's not covered'. . . . You have a hole here that is just going to get bigger.") (quoting fair housing expert Professor Robert Schwemm)*; see also* Adam Liptak, *The Ads Discriminate, But Does the Web?*, N.Y. TIMES, Mar. 5, 2006, at A10 ("Whatever the merits of the debate, judicial decisions suggest that only Congressional action can change the legal landscape.").

138. *See* H.R. REP. NO. 104-458 (1996) (Conf. Rep.) (overruling Stratton-Oakmont v. Prodigy).

Trafficante[139] has to have some limit. Common sense dictates that the FHA's restrictions on speech should not extend to individuals seeking a roommate to share intimate living quarters—an association quite different from the traditional landlord-tenant relationship. As Professor Eugene Volokh has pointed out,[140] the right to intimate association, which has been recognized by the Supreme Court,[141] together with free speech rights, should give an individual the right to state roommate preferences in online advertisements. Case law interpreting the government's ability to regulate speech in the context of the FHA is inapplicable to roommate situations. In *Hunter*,[142] the Fourth Circuit relied on Supreme Court precedent emphasizing the government's ability to regulate commercial speech;[143] it is not obvious that personal roommate advertisements are in fact commercial speech.[144]

In *Ragin*,[145] the Second Circuit rejected the newspaper's freedom of speech argument because commercial real estate advertisements indicating a prohibited preference "'further an illegal commercial activity: racial discrimination in the sale or rental of real estate.'"[146] Because roommates who qualify for immunity under the FHA's "Mrs. Murphy" exemption are allowed to choose roommates based on otherwise prohibited preferences, the placing of an advertisement does not further an illegal activity.[147] Since § 3604(c) prohibits not

139. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972).

140. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_05_13-2007_05_19.shtml#1179259134 (May 15, 2007, 15:58 PST).

141. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Nancy C. Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269 (2006).

142. United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).

143. *Id.* at 211.

144. *See, e.g.*, Schwemm, *supra* note 20, at 267–94. Schwemm argues that the language "'with respect to the sale or rental of a dwelling' . . . . indicates 3604(c)'s ban on discriminatory statements applies only to communications by landlords, realtors, and other housing professionals made in the context of the sale or rental of a dwelling." *Id.* at 269–70 (citation omitted).

145. Ragin v. N.Y. Times Co., 923 F.2d 995 (2d Cir. 1991).

146. *Id.* at 1002 (quoting Ragin v. N.Y. Times Co., 726 F. Supp. 953, 962 (S.D.N.Y. 1989)).

147. *See also* Adam Liptak, *Fair Housing, Free Speech and Choosy Roommates*, N.Y. TIMES, Jan. 22, 2007, at A12 ("In choosing a real roommate—somebody who shares your bathroom and kitchen—you should be allowed to have and disclose whatever idiosyncratic

only discriminatory advertising, but also discriminatory statements, the FHA provides no legal avenue for an individual to find a suitable roommate other than placing an advertisement with no identifying information involving protected categories and sifting through every response.

While the FHA is intended to safeguard the right to fair housing for all protected groups, it was initially passed to help minorities.[148] One should view the current ability of individuals to search for roommates with that same frame of reference. For instance, suppose that two Orthodox Jewish college freshmen seek a third roommate to share their apartment. While they live in a town where the overwhelming majority of residents are non-Jewish, they would prefer to live with another Orthodox Jew.[149] The information asymmetry that results from prohibiting any information based on protected categories creates a formidable barrier to these individuals finding an acceptable roommate.[150] Furthermore, it seems illogical to

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ideas you have about your living arrangements, even discriminatory ones. Roommate ads are more like personal dating ads, where discrimination is rampant and accepted . . . .").

148. Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 435 (1998).

149. *See, e.g.*, Sarah Schillachi, *Bulletin Board with a Difference; Orthodox Jews Have Their Own Craigslist*, HERALD NEWS (Passaic County, NJ), Jan. 4, 2008, at A01 (describing "Luach.com . . . a bulletin board Web site serving the Orthodox Jewish community," with job postings and roommate advertisements). Any roommate advertisements placed on this Web site would likely be considered illegal by indicating a preference based on religion because of the medium involved. *See* 24 C.F.R. 100.75(c)(3) (2008) ("Discriminatory notices, statements and advertisements include . . . [s]electing media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.").

150. *See* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 134 (2003). Professor Bernstein discusses the consequences of roommates not being able to advertise their preferences:

> The result is that persons who place classified ads for roommates waste their time, as well as the time of many of those who respond to their ads, by inviting and dealing with inquiries from persons who fail to meet the actual 'discriminatory criteria.' The advertising restriction can be particularly onerous in jurisdictions that ban housing discrimination on the basis of criteria beyond the standard categories . . . covered by federal law.

Id. Professor Bernstein also argues that HUD's interpretation of the FHA is unconstitutional because it allows "[g]overnment authorities . . . to dictate to commercial entities the content of their advertisements." *Id.* at 76. For a discussion of HUD's interpretations to which Professor

prevent people from stating a preference when they are explicitly allowed by the FHA to discriminate in whom they choose as a roommate.

Allowing roommate advertisements to state preferences can empower minorities to find those with whom they wish to live. Rather than causing individuals to splinter off into homogeneous groups, this could facilitate residential housing integration, an important goal of the FHA.[151] This empowerment of minority roommate seekers to find each other is analogous to professional networks for Indian and Chinese computer engineers in Silicon Valley who pool their resources because they perceive themselves as susceptible to employment discrimination.[152] While plaintiffs like the CLC in *Craigslist* identified negative, if not offensive, advertisements discriminating against protected classes,[153] roommate advertisements can also discriminate in "positive" ways by seeking roommates from different protected classes. This is similar to the FHA's immunity for advertisements that discriminate in favor of protected groups, such as the disabled.[154] The one exception to this line of reasoning is

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Bernstein is referring, contained in the withdrawn 24 C.F.R. pt. 109, see *supra* notes 69–73 and accompanying text.

151. *See* SCHWEMM, *supra* note 32, at § 2:3 ("[The] legislative history makes clear that residential integration is a major goal of the Fair Housing Act, separate and independent of the goal of expanding minority housing opportunities."); *see also* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) ("[A]s Senator Mondale who drafted [42 U.S.C. § 3610] said, the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'") (quoting 114 Cong. Rec. 3422 (1968)).

152. *See* Alan Hyde, *A Closer Look at the Emerging Employment Law of Silicon Valley's High-Velocity Labour Market*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 233, 234–35 (Joanne Conaghan et al. eds., 2002); *see also* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 11—12 (2006). Professor Bagenstos argues that Professor Hyde's "suggest[ion] that similar identity-based networks could improve the job prospects of other groups who are subject to discrimination. . . . will merely entrench the problem by facilitating segregated workplaces." *Id.* at 12. Similarly, allowing individuals not subject to the FHA to publish discriminatory housing advertisements will not necessarily further housing integration, but it will enable minorities to more easily live with whomever they choose. Housing integration could be furthered with discriminatory roommate advertisements because it allows individuals to easily locate potential roommates who are different from them.

153. *See supra* note 119.

154. *See* 24 C.F.R. § 109.20(b)(6) (1994) ("Nothing in this part restricts the inclusion of information about the availability of accessible housing in advertising of dwellings."); *see also id.* § 109.16(b) (approving of advertisements "designed to attract persons to dwellings who would not ordinarily be expected to apply" or to remedy past discrimination).

discrimination based on race. Because 42 U.S.C. § 1982[155] "bars *all* racial discrimination, private as well as public, in the sale or rental of property,"[156] an advertisement expressing a preference based on race would arguably propose an illegal act and should continue to remain prohibited.

One area of concern is that roommate advertisements that state a preference will confuse the public, leading it to believe that all housing advertisements may lawfully state a discriminatory preference. In *Craigslist*, the CLC complained that publishing "the [discriminatory] advertisements misinform home-seekers as to what is and is not illegal. . . . [This] may have the effect of sanctioning and normalizing discrimination in the sale or rental of housing because the public becomes accustomed to seeing such illegal advertisements."[157] The recent HUD studies indicate that the public is already under-informed about housing discrimination.[158] Assuming that an individual knows the law, she will certainly be able to differentiate between roommate advertisements on a roommate Web site and a billboard for the latest subdivision. If § 3604(c) did not apply to roommate advertisements, a simple logo could convey to the viewer that it is exempt from stating discriminatory preferences, just as real estate professionals currently use fair housing logos and posters to convey a commitment not to discriminate.[159]

One must also consider the cost-benefit analysis of the harm avoided by prohibiting discriminatory roommate advertisements. Presumably, the additional time and effort required to locate suitable roommates without stating a preference were thought to outweigh the benefits of keeping housing advertisements free from discrimination when the FHA was passed. However, the damages suffered by an individual who feels slighted by a discriminatory roommate advertisement will probably not be debilitating, and in some instances may only be nominal. In fact, reading an online advertisement that

155. 42 U.S.C. § 1982 (2006).

156. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

157. Complaint at 19, Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06 C 0657), *available at* http://www.clccrul.org/templates/UserFiles/Documents/craigslistcomplaint.pdf.

158. *See supra* notes 74–78 and accompanying text.

159. *See* 24 C.F.R. § 110.1 (2008).

states an individual is not wanted is probably far less traumatic than hearing it in person from a potential roommate.[160] Furthermore, because § 3604(c) prohibits discriminatory statements, an individual turning down a potential roommate because he or she is a member of a protected category cannot even inform the potential roommate of the real reason he or she is being denied housing.[161] This could result in even more wasted time and energy on the part of those answering the advertisements.

The continued interpretation of CDA immunity for Web sites hosting roommate advertisements is critical for the viability of housing advertisements on the Internet. Most of the cases involving construction of the CDA have correctly applied the statute as Congress intended. *Zeran* is important for its reasoning that holding ISPs liable as publishers would be an overwhelming burden and a nearly impossible task.[162] Likewise, the courts in *Blumenthal* and *Ben Ezra* properly immunized AOL from liability as a publisher because the ISP either had or exercised the power to delete content.[163] All three of these holdings are supported by the plain text of the CDA.[164] Also, *Doe*'s reading of § 230(c)(2) as a grant of immunity only when the ISP does not create the objectionable content is consistent with the CDA's plain text.[165]

The Ninth Circuit's holding in *Carafano* that the solicitation and aggregation of information into profiles on Matchmaker.com did not

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160. *Cf.* Rennie v. Dalton, 3 F.3d 1100, 1107 (7th Cir. 1993) (dismissing a sexual harassment claim based on two conversations that were not personally directed at the plaintiff and therefore suggesting that discrimination aimed at others is not as upsetting).

161. *See* Schwemm, *supra* note 20, at 192 ("[T]he smallest housing providers, including 'Mrs. Murphy'-type landlords, are barred from making discriminatory statements. Such housing providers may engage in discriminatory housing practices, but they cannot tell anyone they are doing so.").

162. Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

163. Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000).

164. *See* 47 U.S.C. § 230(a)(4) (2006) ("The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."*); id*. § 230(c)(2)(a) (removing liability for ISPs that remove objectionable material, "whether or not such material is constitutionally protected").

165. *See id.* § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

transform the Web site into an ICP[166] is also an important bulwark for § 230 immunity because the act of compiling information and making it easily retrievable is critical to a Web site's utility. While the Ninth Circuit's en banc panel ruled that "[p]roviding neutral tools for navigating websites is fully protected by CDA immunity, absent substantial affirmative conduct on the part of the website creator promoting the use of such tools for unlawful purposes,"[167] its standard that a Web site loses CDA immunity when it "materially contributed to the unlawfulness of the information" does not give clear guidance to Web site operators.[168]

Comparing *Roommates.com* to *Craigslist* illustrates the need for bright-line rules that allow Web sites and ISPs to plan accordingly. How much information can a Web site solicit, if any, before it becomes an ICP? How extensively can a Web site organize unsolicited data before it becomes an ICP?[169] *Craigslist* was an easy CDA case because of the hands-off approach taken by the Web site; it is basically an electronic bulletin board that allows users to police content and take down offensive advertisements.[170] Yet other

166. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

167. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 n.37 (9th Cir. 2008). According to one commentator, the majority emphasized the narrow application of its rule, but "it's virtually impossible to articulate in crystal-clear terms why Roommates.com crossed the line while many other websites with similar user interactions still qualify for 230. . . . [Plaintiffs] will find some judges who ignore the philosophical statements and instead turn a decision on the opinion's myriad of ambiguities." Technology and Marketing Law Blog, http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm (Apr. 3 2008, 20:05 PST).

168. *Roommates.com*, 521 F.3d at 1182–83 (McKeown, J., dissenting). Judge McKeown accuses the majority of "collaps[ing] . . . substantive liability with the issue of immunity . . . . Whether the information at issue is unlawful and whether the webhost has contributed to its unlawfulness are issues analytically independent of the determination of immunity." *Id.*

169. The Ninth Circuit panel insisted that "[t]he message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune." *Id*. at 1174. Yet it is also stated that "[w]ebsites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity." *Id.* at 1174.

170. The only services Craigslist provides, other than a spot in cyberspace for individuals to place their advertisements, are (1) a category for roommate advertisements, (2) a basic search function (which could be duplicated using a standard search engine), and (3) an anonymizing email service. Kurth, *supra* note 8, at 830–31. For an analysis of how search engines could be affected by CDA case law, see James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 37 (2002) ("[T]he growing integration of search engines with other

interactive computer services need to know when they cross the line and become information content providers, losing § 230 immunity.[171]

Fair housing and integration are important goals, but they must be balanced against the rights of roommate seekers to speak freely and associate with whomever they want. This is particularly important considering the progress that has already been accomplished and the massive societal changes that have taken place since the FHA's passage. It is incorrect to characterize roommate searching online as commercial activity and it is illogical to preclude individuals from talking about what they can legally do. Web sites and ISPs provide an important mechanism that allows individuals to find housing quickly and easily; they should continue to be protected as long as they are not producers of discriminatory content. There is no longer a sufficient policy justification to prevent individuals from expressing their roommate preferences online.

CONCLUSION

The contrast between the *Craigslist* and *Roommates.com* cases exemplifies the way in which courts are struggling with the intersection of the FHA and the CDA. It also shows that fair housing groups are willing to take on ICSs despite their bleak prospects of success. While courts fine-tune the limits of CDA immunity, § 3604(c)'s application to cyberspace continues to be limited. Examining the important cases interpreting the FHA and the CDA, as well as scrutinizing the justification for applying § 3604(c) to roommate searching online, this Note argues for clear rules for ICSs and § 3604(c) exemption for online roommate seekers. In the final analysis, it most likely will be up to Congress to produce either result.

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applications raises concerns, particularly for search engines associated with creative communities. . . . [I]f the search engine itself adds some content of its own to the recommendation [even one sentence], that additional content might fall outside of Section 230's protections.").

171. *See, e.g.*, Matthew Brodosky, *The World Wide Whoa: Old Trusted Protections Can't Be Counted On Anymore When It Comes to Content and Liability in the Wild Web 2.0*, RISK & INSURANCE, Sept. 1, 2007, at 45 (conveying the concerns of Silicon Valley over the outcome of the initial ruling in *Roommates.com* and recommending "tech E&O," or technological errors and omissions insurance, as one answer to the uncertainty in this area of the law).